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ORIGINAL

May 13, 2003

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MAY 13 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Marlene H. Dortch, Esquire
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

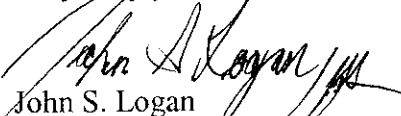
Re: **Notification of Ex Parte Communication**
MB Docket No. 02- 277, MM Docket Nos. 01- 235, 01- 317, and 00- 244

Dear Ms. Dortch:

This is to advise you, in accordance with Section 1.1206 of the FCC's rules, that on May 12, 2003, Barry Drake, President of Backyard Broadcasting Holdings, LLC ("Backyard Broadcasting"), Anne Swanson of this office, and I met with W. Kenneth Ferree, Chief, Media Bureau, and Paul Gallant, Special Advisor, Media Ownership Working Group, to discuss Backyard Broadcasting's concern that any revision of the definition of radio markets, particularly a reformulation based on Arbitron data, would competitively disadvantage small, recently established companies vis-à-vis larger and more entrenched radio owners. If the FCC nonetheless adopts such a change, Backyard Broadcasting stresses the importance of grandfathering and allowing free transferability of any non-compliant clusters and of giving all participants in a market the ability to increase station ownership to the level of the largest grandfathered cluster. The enclosed handout was distributed at the meeting.

As required by section 1.1206(b), two copies of this letter are being submitted for each of the above-referenced dockets.

Very truly yours,


John S. Logan

Enclosure
cc by telecopy:

W. Kenneth Ferree, Esq.
Paul Gallant, Esq.

**The Substitution of Arbitron Metro Data To Govern Local Market Definition Will
Hamstring Small and Medium-Size Group Owners Seeking To Compete Effectively with
Mega-Groups in Local Markets**

**MM Docket Nos. 00-244, 01-235, 01-317
MB Docket No. 02-277**

Backyard Broadcasting is a small, recently established independent company, dedicated to local radio, with a total of 22 radio broadcast stations in the Muncie, Indiana (Arbitron Metro Rank 201), Olean, New York (Arbitron Metro Rank 207), Elmira-Corning, New York (Arbitron Metro Rank 213), Williamsport, Pennsylvania (Arbitron Metro Rank 259), and Jackson, Mississippi (Arbitron Metro Rank 123), markets.

- To compete effectively against mega-owners who can spread their risks over scores of markets, small group owners like Backyard need the ability to cluster stations pursuant to the same rules under which the mega-consolidators have already built their businesses.
 - Despite its relatively limited resources, Backyard directly competes with some of the largest consolidators, including Clear Channel in the Jackson, Mississippi, and Williamsport, Pennsylvania, markets, Infinity, Entercom, and Citadel in the Olean, New York, market, and Citadel in the Muncie, Indiana, market.
 - Operating under the existing rules and market definitions, these mega-consolidators were able to establish effective and efficient clusters of stations in various markets, spreading fixed costs among stations within a market and risk among stations in several markets.
 - Recent entrants like Backyard must be afforded a level playing field as they try to grow and compete against such already large and dominant competitors. This means allowing new entrants the same opportunities to create viable station groups capable of competing with the established dominant groups.
- The use of Arbitron Metro Market data, particularly in smaller markets, imposes a far more restrictive standard than existing rules and would stymie new entrants seeking to compete effectively against entrenched mega-consolidators and their existing clusters.
 - The Commission recently reviewed and approved Backyard's acquisition of control of several stations in the Muncie, Indiana, area. Backyard's holdings, however, could exceed the ownership rules if Arbitron Metro Market data is used to determine the size of the market. Arbitron assigned just 12 stations to the newly-created Muncie – Marion, Indiana, Metro Market. Although the ownership rules allow common ownership of just 3 FM stations and 5 stations overall in a 12 station market, Backyard already holds 6 stations in the defined market, including 5 FM stations.
 - Defining smaller markets involves a great deal of discretionary line drawing. In the absence of a single large city, one must pick and choose among groups of smaller communities to form new markets. If such choices are made arbitrarily and without

reference to existing and potential competition, the formation of new markets could have an immediate and devastating effect on smaller group owners. For this reason, the Commission must not extend the use of Arbitron Metro Market definitions to smaller markets without careful consideration of the effects on such markets.

- To the extent the use of Arbitron Metro Market definitions would create more restrictive standards in smaller markets, such acts would be reregulatory and contrary to the intent of Section 202(h) of the Telecommunications Act of 1996 and the presumption in favor of repeal that courts have found must be applied in construing its provisions.
- More restrictive markets created by the use of Arbitron Metro Market data could force station divestiture or the breakup of existing clusters.
 - For smaller group owners to be able to maintain value, they must have the ability to keep existing clusters intact.
 - Forcing the divestiture of stations from an existing cluster would have a devastating and immediate effect on a smaller group owner by causing a precipitous loss of market value for its properties and an inability to obtain loan capital.
 - Moreover, unless existing clusters may be transferred or assigned, small group owners will lose much of the market value of their stations because prospective buyers will not be able to realize the benefits of existing clusters. Most smaller growing companies likely will need to restructure to secure financing, change ownership in initial public offerings and, potentially, merge with other comparably sized companies if they are to grow into effective competitors. The mega-owners already have passed through that stage of development. Under more restrictive market definitions, even a simple corporate restructuring, IPO or other change of control could force the break up of clusters, destroying much of the value of smaller companies like Backyard and precluding them from becoming effective competitors against the mega-owners.
 - At the same time, more restrictive market definitions, combined with transfer/assignment protections for existing clusters (*i.e.*, “grandfathered clusters”), would simply lock-in the current patterns of market dominance while blocking the development of potentially competitive new clusters.
- Arbitron is a public company accountable to its shareholders and to its largest customers, which are the entrenched mega-consolidators. The economic incentives guiding Arbitron’s decisions do not necessarily align with the public interest benefits that the Commission seeks to realize in this proceeding. Use of Arbitron market definitions, which the company may vary from time to time, would mean that the value of market clusters of emerging competitors may become a function of Arbitron’s commercial interests.

- For instance, in 1987, Arbitron lowered its estimate of the Black population in the Houston, Texas, market after certain major station owners petitioned for such changes. Radio station KMJQ(FM), which concentrated on Black listeners, lost market share as a result. In response, KMJQ(FM) submitted population reports from the City of Houston Department of Planning and Development, which were endorsed by the city of Houston and Harris County. Arbitron refused to revise its estimates, however, or even postpone the implementation of the lower estimates pending further studies. (*See KMJQ, KMJM Drop Arbitron*, Radio and Records, Jan. 13, 1988, at 3, attached hereto.) Similarly, Spanish language broadcasters have criticized Arbitron's failure to take accurate account of language preference, which undermines the Hispanic radio industry by giving a false measure of the listening habits of Spanish-language listeners.

Conclusions:

- *Only Fix What Is Broken.* The Commission should not disrupt the market by drastically altering radio market definitions. Although the current rules create certain inconsistencies and discrepancies that should be addressed (*e.g.*, the "Pine Bluff" problem), radical changes are unnecessary and not in the public interest --- particularly where such changes will tighten existing restrictions.
- *Arbitron Is Not The Answer.* Use of Arbitron Metro Market Data will lead to arbitrary market definitions that may not reflect competitive realities. In particular, Arbitron Metro Market data must not be used in markets smaller than the Top 200 because the impact will be arbitrary and inconsistent. Moreover, adopting more restrictive Arbitron Metro Markets will only disrupt the efforts of emerging small companies that should be encouraged as effective competitors to the mega-consolidators.

Attachment



KMJQ, KMJM Drop Arbitron

MSI's Houston Black Population At Issue

KMJQ/Houston and sister Urban KMJM/St. Louis will not renew their Arbitron subscriptions following a decision by Arbitron's population data supplier Market Statistics, Inc. (MSI) to stand behind a lower estimate of Harris County (Houston)'s black population.

According to a KMJQ statement, two Houston competitors, Viacom Country outlet KIKK and Group W's Beautiful Music KODA, "petitioned Arbitron to lower its estimates of Houston's black population. Pressure by these two major broadcast groups led to an announcement in August [1987] that Arbitron would lower the black population estimates" in the fall '87 report.

Amplifying the sequence of events, Arbitron VP Rhody Bosley said KIKK and KODA petitioned MSI to lower the estimate on the basis of new 1987 data from the Texas Department of Health. KMJQ contends that data actually stemmed from a 1984 survey. MSI officials were unavailable for comment.

KMJQ Survey "Not Considered"

KMJQ protested the new lower estimate, and at a meeting with Arbitron and MSI officials, presented a population report from Houston's Dept. of Planning & Development, endorsed by the city of Houston and Harris County. This data, KMJQ states, "showed the black population to be greater than the MSI estimates and is information

more current than any MSI has been using."

Arbitron turned the decision over to MSI, which wrote KMJQ that it was satisfied with its estimates and would not take into consideration the new data KMJQ had submitted.

KMJQ/See Page 21

KMJQ

Continued from Page 3

bed. According to Bosley, MSI felt it was unable to validate the new survey's numbers. "In any kind of research, there's some kind of lag period," Bosley added.

KMJQ states that Arbitron refused to postpone the implementation of the new lower estimates pending further studies. Sr. VP/GM Barry Drake commented, "When the burden of proof was placed on our shoulders, we responded by furnishing the most accurate, up-to-the-minute data available. Obviously, Arbitron could not face those other stations and reverse their decision to lower the black population. This is a sad day for our industry."

In response, Bosley emphasized that the decision was MSI's, stating, "We accept the data that MSI supplies, so we'll [stick with it]." He pointed out that MSI supplies population data not only to Arbitron in all markets, but to Birch and two other major research organizations. Bosley also said the lower black population estimate was calculated to affect KMJQ's 12+ share by at most a tenth of a point, and expressed disappointment at KMJQ and KMJM's decision.

KMJQ MAJIC 102 FM

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